



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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May 11, 2022

Daniel S. Hentschke
City of Santa Barbara
PO Box 1990
Santa Barbara, CA 93102

Re: Your Request for Advice
Our File No. A-22-039

Dear Mr. Hentschke:

This letter responds to your request for advice regarding conflict of interest provisions of the Political Reform Act (the “Act”).¹ Please note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Section 1090. Also note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

QUESTION

Is the designated project manager of the independent contractor corporation that the City of Santa Barbara (“City”) contracted with to conduct a competitive procurement process for franchised waste hauling services considered a “consultant” under the Act and therefore required to file a Statement of Economic Interest (Form 700)?

CONCLUSION

No. Based on the facts provided, the designated project manager of the independent contractor corporation that the City contracted with does not meet the definition of “consultant” under the Act and is therefore not required to file a Form 700.

FACTS AS PRESENTED BY REQUESTER

You are the Assistant City Attorney for the City and you seek advice on its behalf. The City intends to retain R3 Consulting Group, Inc. (“R3”) as an independent contractor “to conduct a competitive procurement process for franchised waste hauling services that includes a comprehensive analysis of the City’s solid waste collection system, recommendations for new

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18104 through 18998 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

services in the franchise agreement, and preparing and issuing the Request for Proposals (“RFP” package.” The scope of these services is specified in comprehensive detail in Exhibit A to the consulting contract (“Agreement”) that you provided.

Carrie Baxter is designated as R3’s consultant representative for administration of the Agreement and is also “the professional responsible to provide the services.” The Agreement requires that the services be completed between April and December 2022. The services may be extended because the current solid waste franchise does not expire until June 7, 2023.

Section 13 of the Agreement provides that R3 will not make, participate in making, or in any way attempt to use its position to influence a City decision in which R3 knows or has reason to know that it has a direct or indirect financial interest. R3 must not have any financial interest throughout the duration of the Agreement. This contractual conflict of interest prohibition is independent of any obligations R3 or its officers or employees may have under the law. It is your opinion that the scope of work under the Agreement does not authorize R3 to make a governmental decision as defined in Regulation 18704 or perform any function under Regulation 18700.3(a)(1).

The City’s Conflict of Interest Code (“Code”) requires a “consultant” to report at the highest level of reporting comparable to many director and manager positions. Under this category, reporting must be made of all investments, business positions, source of income, and interests in real property.

Based on the scope of work under the Agreement, Carrie Baxter will be participating in making governmental decisions and will be performing the same or substantially all of the same duties as a designated employee. As outlined in the Agreement, the duties Carrie Baxter is expected to perform include coordinating with City staff to provide a comprehensive analysis of the City’s solid waste program and providing information, recommendations, and advice to the City and present the recommendation to the City Council. Exhibit A to the Agreement suggests that the R3 as the consultant, carried out by Carrie Baxter, will coordinate the making of recommendations for approval by the City.

ANALYSIS

The Act prohibits any public official from making, participating in making, or using his or her position to influence a governmental decision in which the official has a financial interest. (Section 87100.) A “public official” includes every member, officer, employee, or consultant of an agency. (Section 82048.) If a person is considered a “consultant” for purposes of the Act, he or she is subject to the conflict of interest provisions therein and, if conflicted, must recuse him or herself from any governmental decisions, including influencing decisions. The analysis of whether a person who has a contract with a public entity is a “consultant” for purposes of Section 87100 is distinct from the inquiry under Section 1090. (See *Ennis* Advice Letter, A-15-006.)

Consultant Under the Act

A “consultant” under the Act is an individual who works pursuant to a contract with an agency, if he or she engages in the following activities under the contract:

- (1) Makes a governmental decision whether to:

- (A) Approve a rate, rule, or regulation;
- (B) Adopt or enforce a law;
- (C) Issue, deny, suspend, or revoke any permit, license, application, certificate, approval, order, or similar authorization or entitlement;
- (D) Authorize the agency to enter into, modify, or renew a contract provided it is the type of contract that requires agency approval;
- (E) Grant agency approval to a contract that requires agency approval and to which the agency is a party, or to the specifications for such a contract;
- (F) Grant agency approval to a plan, design, report, study, or similar item;
- (G) Adopt, or grant agency approval of, policies, standards, or guidelines for the agency, or for any subdivision thereof; or

(2) Serves in a staff capacity with the agency *and in that capacity participates in making a governmental decision* as defined in Regulation 18704(a) and (b)² *or performs the same or substantially all the same duties* for the agency that would otherwise be performed by an individual holding a position specified in the agency's Conflict of Interest Code under Section 87302.

(Regulation 18700.3(a), emphasis added.)

Thus, there are two ways that an individual can become a “consultant.” If he or she, pursuant to a contract with a government agency, (1) makes government decisions as described in Regulation 18700.3(a)(1); or (2) serves in a staff capacity and either (a) participates in governmental decisions (as defined) or (b) performs the same or substantially all the same duties that would otherwise be performed by an individual in a position listed in the agency's conflict of interest code.

R3 is a corporation and thus does not meet the definition of “consultant” under the Act. (Page Advice Letter, No. A-16-044.) However, individual employees of R3 may meet the definition of “consultant.” (See *Hayden* Advice Letter, A-84-319; *Rose* Advice Letter No. A-84-307; and *Kaplan* Advice Letter, No. A-82-108.) Carrie Baxter, R3's employee designated “project manager” and “consultant representative,” is the City's primary point of contact with R3 for administration of the contract and will provide services under the contract. Under the terms of the Agreement, R3 may not change the project manager or representative without written consent of the department head. Any substitution is a material breach of the contract.

We will next examine whether Carrie Baxter is a “consultant” under the Act.

1. Makes government decisions

Under Regulation 18700.3(a)(1), if an individual is performing services under a contract with a government agency and “makes a government decision” for the agency, then the individual

² Under Regulation 18704(a) a public official makes a governmental decision if the official authorizes or directs any action, votes, appoints a person, obligates or commits the official's agency to any course of action, or enters into any contractual agreement on behalf of the official's agency. Under Regulation 18704(b) a public official participates in a governmental decision if the official provides information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review.

is a “consultant.” Under this first test, where the contract expressly provides for a significant amount of control and direction by the agency, which also retains the ultimate decision-making authority, the contracting entity’s personnel does not fulfill the qualifications of a consultant. (*Del Guercio* Advice Letter, I-01-116.)

Based on the facts provided, the duties performed under the Agreement by Carrie Baxter include coordinating with City staff to provide a comprehensive analysis of the City’s solid waste program and providing information, recommendations, and advice to the City Council. Exhibit A to the Agreement, provides that the R3 consultant, to be carried out by Carrie Baxter, will coordinate the making of recommendations, but the Agreement does suggest that the ultimate approval of the recommendation and service agreement rests with the City. Accordingly, the facts provided indicate that Carrie Baxter will not perform any of the functions listed in subdivision (a)(1) of Regulation 18700.3.

We next look to the second manner in which an individual may become a consultant under Regulation 18700.3(a)(2).

2. Serves in a staff capacity

The Commission has explained that the test for determining whether an individual serves in a staff capacity is two-pronged. Both prongs of the test must be satisfied for an individual to qualify as a consultant.

The first prong is used to identify only individuals who are performing substantially all the same tasks that would usually be performed by staff members of the governmental agency. This eliminates individuals who work only on a discrete project and includes the quasi-staff member. (*See Jacobs* Advice Letter, No. A-16-050.) Included in the elements of this prong is the requirement that the individual participate in making a governmental decision as defined in Regulation 18704.

You state that Carrie Baxter is performing substantially the same duties as a project manager would provide to the City as a designated employee. If the project manager is designated in the agency’s Code because the position is one in which the person makes or participates in the making of decisions, then this first prong of the test is met for Carrie Baxter performing those same duties under the Agreement. (*Ferber* Advice Letter, No. A-98-118.) Based on the facts, this position involves the participation in the making of governmental decisions as defined in Regulation 18704 since she will be carrying out the Agreement and providing the overall recommendation to the City.

The second prong is a temporal qualifier. This is used to limit the individuals included as consultants under the “staff capacity” test to those who work for the agency for a significant amount of time. (*Murad* Advice Letter, No. A-04-067.) The Commission has advised that implicit in the notion of service in a staff capacity is an ongoing relationship between the contractor and the public agency. We have previously found that a contractor serves in a staff capacity when the contract calls for work to be performed “over more than one year” on “high level” projects (*Ennis* Advice Letter, No. A-15-006; see also *Ferber* Advice Letter, No. A-98-118). We have further advised that a contractor does *not* act in a staff capacity where the work is to be performed on one project or a limited number of projects over a limited period of time (*Sanchez* Advice Letter, No. A-97-438); where the relationship between the contractor and the agency would last only 12-16 months with no ongoing relationship contemplated (*Harris* Advice Letter, No. A-02-239); and where, under a

multi-year contract, the contractor would perform only on a sporadic basis. (*Maze* Advice Letter, No. I-95-296; *Parry* Advice Letter, No. I-95-064.)

In the *Harris* letter, the contractor did not serve in a staff capacity where the public agency contracted with a vendor for Information Technology services to develop, implement, and operate the Automated License Data System to replace the agency's manual paper-based licensing system with an automated system and to also develop an RFP. (*Harris* Advice Letter, No. A-02-239.) The contractual duration was over a 12-16 period. (*Id.*) Similarly, the Agreement here requires that the services be completed between April and December 2022 and the services terminate with the award of a new solid waste franchise. There is no expectation of future services and, although there is potential that the services may be extended through June 7, 2023, when the solid waste franchise expires, there is a definite beginning and ending point to the contractual relationship.

If Carrie Baxter's relationship and duties with the City terminates at the end of the mentioned timeframe and she works exclusively on this one project, then no ongoing relationship has been established and she is not a consultant under the Act. If, however, over time the nature of the services that Carrie Baxter performs becomes extended beyond those discussed or includes the same or substantially the same duties as would otherwise be performed by an individual holding a position that is specified, or should be specified, in the City Code over a longer period of time, then Carrie Baxter would be considered a consultant. The City should contact us for advice if the relationship changes in nature or the City anticipates renewing the Agreement with R3 and Carrie Baxter on a yearly basis.

Based on the above, Carrie Baxter does not have an ongoing relationship with the City and therefore is not a consultant within the meaning of the Act.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Dave Bainbridge
General Counsel

Katelyn L. Greene

By: Katelyn L. Greene
Counsel, Legal Division

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